

1 THE HONORABLE JOHN C. COUGHENOUR

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6 UNITED STATES DISTRICT COURT
7 WESTERN DISTRICT OF WASHINGTON
8 AT SEATTLE

9 UNITED STATES OF AMERICA,

CASE NO. CR16-0258-JCC

10 Plaintiff,

ORDER

11 v.

12 ERROL MAYERS,

13 Defendant.
14

15 This matter comes before the Court on Defendant Errol Mayers's motion for extension of
16 time to file a motion for a new trial (Dkt. No. 124) and motion for a new trial (Dkt. No. 125).
17 Having thoroughly considered the parties' briefing and the relevant record, the Court finds oral
18 argument unnecessary and hereby DENIES both motions for the reasons explained herein.

19 **I. BACKGROUND**

20 On December 6, 2016, after a two-day trial, Defendant Errol Mayers was found guilty by
21 jury of one count of felon in possession of a firearm. (Dkt. Nos. 56, 61, 64.) During trial, the jury
22 heard testimony that police responded to an altercation between Mayers and his girlfriend at a
23 casino. (Dkt. No. 126-1 at 116–118.) The jury watched surveillance video-footage of Mayers
24 place an object into bushes outside the casino and police subsequently recover a handgun from
25 the bushes 10 minutes later. (Dkt. No. 126-1 at 80–89, 121–123.)

26 Post-verdict, Mayers filed three separate motions for a new trial. (Dkt. Nos. 86, 90, 101).

1 The Court denied all three motions. (Dkt. Nos. 91, 95, 108.) Mayers’s counsel subsequently filed
2 a motion to withdraw. (Dkt. No. 110.) Magistrate Judge Brian Tsuchida granted the motion and
3 appointed new counsel. (Dkt. No. 114.) In light of the change in counsel, the Court continued
4 sentencing until August 22, 2017. (Dkt. No. 112.) On its own motion, the Court subsequently
5 rescheduled sentencing twice—first to October 17, and then to November 17, 2017. (Dkt. Nos.
6 121, 123.)

7 On October 9, 2017, Mayers filed a motion to extend the deadline for filing a motion for
8 a new trial to October 31, 2017. (Dkt. No. 124.) The same day, Mayers filed a motion for a new
9 trial based on the ineffective assistance of counsel of his first attorney. (Dkt. No. 125.) Mayers
10 asserts that his trial counsel failed to call key witnesses, failed to make timely objections to
11 prejudicial testimony, failed to request a key jury instruction, and that his attorney had a conflict
12 because he was under criminal investigation for an unrelated charge of witness tampering while
13 he represented Mayers. (*Id.* at 1–2.)

14 **II. DISCUSSION**

15 **A. Mayers’ Motion for a New Trial**

16 The Federal Rules of Criminal Procedure permit the Court to vacate a judgment and grant
17 a motion for a new trial “if the interest of justice so requires.” Fed. R. Crim. P. 33(a). The
18 decision to grant a new trial “is within the sound discretion of the district court[.]” *United States*
19 *v. A. Lanoy Alston, D.M.D., P.C.*, 974 F.2d 1206, 1212 (9th Cir. 1992) (citation omitted). A
20 motion for a new trial that is based on any ground other than newly-discovered evidence must be
21 filed within 14 days of the verdict. Fed. R. Crim. P. 33(b)(2). Mayers’s motion for a new trial is
22 not timely under Federal Rule of Criminal Procedure 33 because it was filed months after his
23 verdict. (Dkt. Nos. 64, 124.) Accordingly, Mayers filed a motion asking the Court to extend the
24 deadline for him to file a motion for a new trial. (Dkt. No. 124.)

25 The Court may consider a motion for a new trial made 14 days after the verdict if “the
26 party failed to act because of excusable neglect.” Fed. R. Crim. P. 45(b)(1)(B). Mayers’s

1 untimely motion for new trial is not based on newly discovered evidence, but on excusable
2 neglect. (Dkt. No. 124 at 2.)¹ District courts apply a four-factor balancing test to determine
3 whether a defendant's failure to timely file a motion was the result of excusable neglect. *Pincay*
4 *v. Andrews*, 389 F.3d 853, 855 (9th Cir. 2004). The factors to be considered are: "(1) the danger
5 of prejudice to the non-moving party, (2) the length of delay and its potential impact on judicial
6 proceedings, (3) the reason for the delay, including whether it was within the reasonable control
7 of the movant, and (4) whether the moving party's conduct was in good faith. *Id.* (citing *Pioneer*
8 *Investment Services Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380, 395 (1993)).

9 At the outset, the Court does not perceive prejudice to the Government if it were to grant
10 Mayers' motion for a new trial, nor does it find evidence that the motion is made in bad faith.
11 The Government did not oppose Mayers' motion based on untimeliness, (Dkt. No. 126), and
12 Mayers makes the motion based on his prior attorney's performance at trial. (Dkt. No. 125 at 1).
13 That said, both the length and reasons for the delay are problematic.

14 First, the length of the delay is substantial, particularly when compared with the normal
15 14-day limit allowed by the Federal Rules. Fed. R. Crim. P. 33(b). Mayers makes his motion 10
16 months after the verdict and 4 months after new counsel was appointed. (Dkt. Nos. 64, 114, 125.)
17 This Court has previously found that a similar untimely motion for a new trial based on
18 ineffective assistance of counsel was not the product of excusable neglect. *United States v.*
19 *Jassal*, Case No. CR08-0052-JCC, Dkt. No. 158 at 6, *aff'd* 388 F. App'x 748, 750 (9th Cir. 2010)
20 (unpublished) (finding no excusable neglect where defendant filed a motion for new trial based
21 on ineffective assistance of counsel seven months after the verdict and five months after the
22 appointment of new counsel).

23 Second, the reasons for the delay do not adequately explain the significant time that
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25 ¹ Moreover, the Ninth Circuit has held that evidence of ineffective assistance of counsel
26 does not fall under the Rule 33 exception for newly-discovered evidence. *See United States v.*
Hanoum, 33 F.3d 1128, 1130 (9th Cir. 1994).

1 passed before Mayers' motion for new trial was filed. In his motion, Mayers states that
2 "substantial work was required to prepare and file the motion for a new trial, including reviewing
3 the trial transcript, obtaining the fingerprint case file, interviewing prospective witnesses,
4 obtaining witness interview transcripts, and obtaining witness declarations." (Dkt. No. 124 at 2.)
5 That explanation addresses the four-month delay since new counsel was appointed, which the
6 Court discusses below, but says nothing about the nearly six-month gap between the jury's
7 verdict and Mayers' request for new counsel. (Dkt. Nos. 64, 114.)

8 Post-verdict, Mayers filed three separate motions for a new trial through his prior
9 attorney, none of which dealt with his counsel's ineffective assistance at trial. (Dkt. Nos. 86, 91,
10 101.) It was not until the Court denied each of those motions, that Mayers sought a new attorney
11 to raise his ineffective assistance of counsel motion. (Dkt. No. 110.) Nor does Mayers' current
12 motion for a new trial deal with any of his attorney's post-verdict conduct; rather, it is
13 completely limited to counsel's performance at trial. (Dkt. No. 124.) In criminal cases, courts
14 have been more lenient in not holding defendants responsible for the omissions of their attorneys
15 because of the important rights at stake. *See, e.g., Stutson v. United States*, 516 U.S. 193, 196
16 (1996). However, a court's determination of excusable neglect should still focus "upon whether
17 the neglect of [clients] and their counsel was excusable." *Pioneer Investment Services Co.*, 507
18 U.S. 380, 397. Here, Mayers certainly holds some responsibility for the untimely motion.

19 Moreover, the Court is not persuaded that Mayers could not have moved for a new trial
20 on ineffective assistance of counsel grounds until four months after the appointment of new
21 counsel and less than a month before sentencing. Many of the issues Mayers raises in his
22 motion—for example, counsel's failure to call witnesses, object during trial or offer a specific
23 jury instruction—would have been apparent from review of the transcript of the two-day trial.
24 (See Dkt. Nos. 126-1 at 3–7, 95–96; 126-2 at 31–33.) While the Court can appreciate a party's
25 thoroughness in preparing a motion, it still finds that it was within the reasonable control of
26 Mayers to file his motion for a new trial, or at the least a motion for an extension of time, before

1 four months had passed since he received a new attorney.

2 In weighing the four-factors, the Court finds on balance that Mayers's failure to timely
3 file his motion for a new trial was not the result of excusable neglect and is therefore time-barred
4 under Federal Rule of Criminal Procedure 33(b)(2).

5 **III. CONCLUSION**

6 For those reasons, Defendant's motion for an extension of time to file a motion for a new
7 trial (Dkt. No. 124) and motion for a new trial (Dkt. No. 125) are DENIED.

8 DATED this 2nd day of November 2017.

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12 John C. Coughenour
13 UNITED STATES DISTRICT JUDGE
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